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NOOR KAYES HASHIM ULLAH v. TIMBALAN MENTERI DALAM NEGERI, MALAYSIA & ORS

FEDERAL COURT, PUTRAJAYA
NALLINI PATHMANATHAN FCJ
RHODZARIAH BUJANG FCJ
B HANIPAH FARIKULLAH FCJ
[CRIMINAL APPEAL NO: 05(HC)-140-10-2024(D)]
22 SEPTEMBER 2025

C ***Abstract*** *– When issuing an order for removal and detention under the Immigration Act 1959, the relevant authorities must give due consideration to all material circumstances of the individual. This includes, but is not limited to, the individual's status as a refugee as assessed by the United Nations High Commissioner for Refugees and their potential status as a minor. Orders made without a full and proper* D *investigation or based on flawed evidence are invalid and cannot justify continued detention. Furthermore, indefinite detention that is not proportionate to the objective of expeditious removal is unlawful.*

E ***CRIMINAL LAW:*** *Habeas corpus – Application for writ of habeas corpus – Appeal – Applicant minor and refugee of Rohingya descent – Applicant possessed registered United Nations High Commissioner for Refugees ('UNHCR') issued in Bangladesh – Applicant charged for entering Malaysia without valid passport – Immigration Department issued orders for removal and detention against applicant – UNHCR informed Immigration Department that applicant was minor and confirmed refugee* F *status – Applicant's application for writ of habeas corpus dismissed by High Court – Whether ought to be allowed – Whether applicant's detention in accordance with Immigration Act 1959 – Whether there was transgression of constitutionally permissible limits*

G ***IMMIGRATION:*** *Detention – Removal – Refugees – Applicant minor and refugee of Rohingya descent – Applicant possessed registered United Nations High Commissioner for Refugees ('UNHCR') issued in Bangladesh – Applicant charged for entering Malaysia without valid passport – Immigration Department issued orders for removal and detention against applicant – Whether Director-General of Immigration took into account relevant considerations when issuing orders of* H *detention and removal – Immigration Act 1959, ss. 6(1)(c), 33(1) & 34(1)*

The applicant, a female of Rohingya descent, was arrested in Kelantan in 2023. At the material time, she did not possess a registered United Nations High Commissioner for Refugees ('UNHCR') card in Malaysia but held a UNHCR card issued in Bangladesh. The applicant was charged at the High I Court, under s. 6(1)(c) of the Immigration Act 1959 ('Act'), for entering Malaysia without a valid pass. She was sentenced to five months' imprisonment at the Tanah Merah Immigration Detention Depot

('TMIDD'), Kelantan and was due to be released in January 2024. While serving her imprisonment term, the Deputy Assistant Director of Immigration, *ie*, the first respondent, issued against her orders of removal and detention, under ss. 33(1) and 34(1) of the Act, respectively. During her detention, following an interview by the UNHCR Malaysia, the applicant was registered as a refugee in Malaysia. The TMIDD wrote to the UNHCR to inquire as to whether the applicant held a UNHCR. The UNHCR, in its reply to TMIDD, (i) informed that the applicant was a minor aged 17 years old; and (ii) confirmed that the applicant was indeed registered with them and pleaded for the applicant's early release ('UNHCR letter dated 21 May 2024'). Having failed to secure the applicant's release, the applicant's lawyer applied for the writ of *habeas corpus* at the High Court on the basis that she ought not remain under detention due to her refugee status. The High Court dismissed the *habeas corpus* application. Hence, the present appeal. The issues that arose were: (i) was the applicant's detention in accordance with the Act; and (ii) whether there was a transgression of constitutionally permissible limits.

Held (granting writ of *habeas corpus;* making further orders necessary to secure applicant's safety)
Per Nallini Pathmanathan FCJ delivering the judgment of the court:

(1a) The Act does not detail exhaustively or expressly the considerations that the Director-General of Immigration ('DGI') must take into account when removing an individual from Malaysia. The Act was ambiguous on this point. The relevant factors that should have been, but were not taken into consideration by the DGI were: (i) the status of the applicant as assessed by the UNHCR; and (ii) the possibility that the applicant was a minor at the time when she was detained. (paras 56 & 60)

(1b) The applicant should not be forcibly deported without a due consideration of her circumstances. The two documents from the UNHCR, which ought to have been considered were (i) the UNHCR card. The veracity of the UNHCR should have been given due consideration by the respondents because it was personally handed over to the applicant by a representative from the UNHCR; and (ii) the UNHCR letter dated 21 May 2024, which stated that it was the assessment of the UNHCR that the applicant ought to be released due to the potential detrimental effect from long-term detention. The UNHCR also pleaded that the applicant should not be deported to any country where she would be at risk of persecution. The assessment of the applicant's condition ought to be accorded due consideration as the UNHCR in Malaysia had been deeply involved in handling the Rohingya people who had fled to Malaysia from Myanmar. (paras 72-74)

(2a) There was no full and proper consideration of whether the applicant was a minor. Both the Bangladesh and the Malaysian UNHCR cards stated the applicant's date of birth as 1 January 2007, which would make her a minor at the time of her detention. In deciding the issue of whether the applicant was a minor at the time of her detention, the High Court and the respondents placed reliance on the dental examination of the applicant on 6 June 2023 which found her to be between 18-21 years of age. This dental report was not a conclusive finding on the age of the applicant. The results of the dental examination ought not to have been given the weight which the High Court did, bearing in mind that only an estimated age range was produced. (paras 75 & 78)

(2b) The finding of the dental examination that the applicant was between 18-21 years of age was close enough that she could conceivably have been a minor at the material time, which was the time of her detention in mid-2023. That being the case, the authorities should have erred on the side of caution and treated her as a child as it could not be concluded with all certainty that she was an adult. (para 78)

(3) The DGI had not considered all the relevant factors in issuing the order for the applicant's removal. The order of removal was improperly issued. The said order was made without according to full investigation or consideration to the circumstances of the instant case. Alternatively, the consideration given was based on flawed methodology and/or evidence. Therefore, the order of removal ought not form the basis for the applicant to continue to be held in detention. (para 80)

(4) The applicant had been held for nearly two years and this detention seemed to continue under the applicant's admission to the jurisdiction of the Myanmar embassy. What was essentially an indefinite detention, with no clear end in sight, could not be said to be proportionate to the objective of making arrangements for removal, and that too had not been carried out expeditiously. (para 100)

(5) This was a case where *habeas corpus* should be and was issued. Flowing from the *habeas corpus* order, the court further ordered that, *inter alia*, (i) the applicant should not be re-arrested and detained immediately upon release on the grounds that she was to be deported, until a full consideration of the specific circumstances of her case was undertaken by the relevant authorities. This order, however, was not to exclude the applicant from being detained for an entirely different reason (such as if she commits a theft) and was not to be equated with a right to remain in the country; and (ii) the applicant should be placed in Yayasan Chow Kit or any equivalent shelter until full consideration of her case was complete. (paras 102-104)

Bahasa Melayu *Headnotes*

Pemohon, seorang perempuan berketurunan Rohingya, ditahan di Kelantan pada 2023. Pada masa material, dia tidak memiliki kad Pesuruhjaya Tinggi Pertubuhan Bangsa-Bangsa Bersatu bagi Pelarian ('UNHCR') yang berdaftar di Malaysia tetapi memegang kad UNHCR yang dikeluarkan di Bangladesh. Pemohon didakwa di Mahkamah Tinggi, bawah s. 6(1)(c) Akta Imigresen 1959 ('Akta'), kerana memasuki Malaysia tanpa pas yang sah. Dia dijatuhkan hukuman penjara lima bulan di Depot Tahanan Imigresen Tanah Merah ('DTITM'), Kelantan dan sepatutnya dibebaskan pada Januari 2024. Semasa pemohon menjalani hukuman penjara, Timbalan Penolong Pengarah Imigresen, responden pertama, mengeluarkan perintah pembuangan dan tahanan terhadapnya, masing-masing bawah ss. 33(1) dan 34(1) Akta. Ketika penahanannya, susulan temu bual oleh UNHCR Malaysia, pemohon didaftarkan sebagai pelarian di Malaysia. DTITM menulis surat pada UNHCR untuk bertanyakan sama ada pemohon memiliki kad UNHCR. UNHCR, dalam balasannya pada DTITM, (i) memaklumkan bahawa pemohon seorang bawah umur yang berusia 17 tahun; dan (ii) mengesahkan bahawa pemohon sememangnya berdaftar dengan mereka dan memohon agar pemohon dibebaskan lebih awal ('surat UNHCR bertarikh 21 Mei 2024'). Setelah gagal mendapatkan pembebasan pemohon, peguam pemohon memohon writ *habeas corpus* di Mahkamah Tinggi atas alasan pemohon tidak sepatutnya berterusan ditahan ekoran status pelariannya. Mahkamah Tinggi menolak permohonan *habeas corpus* tersebut. Maka, timbul rayuan ini. Isu-isu yang berbangkit adalah: (i) adakah penahanan pemohon selaras dengan Akta; dan (ii) sama ada terdapat pelanggaran had yang dibenarkan secara berperlembagaan.

Diputuskan (membenarkan writ *habeas corpus;* membuat perintah-perintah lanjut yang perlu demi keselamatan pemohon):
Oleh Nallini Pathmanathan HMP menyampaikan penghakiman mahkamah:

(1a) Akta tidak memperincikan secara menyeluruh atau jelas perihal pertimbangan yang mesti diambil kira oleh Ketua Pengarah Imigresen ('KPI') apabila membuang seseorang individu dari Malaysia. Akta kabur tentang perkara ini. Faktor-faktor relevan yang sepatutnya, tetapi tidak diambil kira oleh KPI adalah: (i) status pemohon seperti yang dinilai oleh UNHCR; dan (ii) kemungkinan bahawa pemohon seorang yang bawah umur semasa dia ditahan.

(1b) Pemohon tidak sepatutnya dihantar pulang secara paksa tanpa pertimbangan wajar terhadap keadaannya. Dua dokumen UNHCR, yang seharusnya dipertimbangkan adalah: (i) kad UNHCR. Kesahihan kad UNHCR harus diberi pertimbangan wajar oleh responden-responden kerana kad tersebut diserahkan secara peribadi pada pemohon oleh wakil UNHCR; dan (ii) surat UNHCR bertarikh 21 Mei

A 2024, yang menzahirkan penilaian UNHCR bahawa pemohon harus dibebaskan kerana terdapat potensi kesan buruk berikutan penahanan jangka panjang. UNHCR juga memohon agar pemohon tidak dihantar pulang ke mana-mana negara di mana terdapat risiko dia akan dianiaya. Penilaian terhadap keadaan pemohon harus diberi pertimbangan wajar
B kerana UNHCR di Malaysia amat giat terlibat dalam mengendalikan orang-orang Rohingya yang melarikan diri dari Myanmar ke Malaysia.

(2a) Tiada pertimbangan penuh dan wajar tentang sama ada pemohon seorang yang bawah umur. Kedua-dua kad UNHCR Bangladesh dan Malaysia mencatatkan 1 Januari 2007 sebagai tarikh lahir pemohon,
C menjadikan dia seorang bawah umur pada masa penahanannya. Dalam memutuskan isu sama ada pemohon seorang bawah umur pada masa penahanannya, Mahkamah Tinggi dan responden-responden bergantung pada pemeriksaan pergigian pemohon pada 6 Jun 2023 yang mendapati usianya dalam lingkungan 18-21 tahun. Laporan
D pergigian ini bukan dapatan muktamad tentang usia pemohon. Keputusan pemeriksaan pergigian tersebut tidak sepatutnya diberikan pemberatan, seperti yang telah diberi oleh Mahkamah Tinggi, dengan mengambil kira bahawa hanya anggaran julat usia yang dikemukakan.

(2b) Dapatan pemeriksaan pergigian bahawa usia pemohon dalam
E lingkungan 18-21 tahun adalah hampir tepat bahawa dia berkemungkinan seorang bawah umur pada masa material, iaitu masa penahanannya pada pertengahan 2023. Oleh itu, pihak berkuasa sepatutnya mengambil langkah berhati-hati dan melayannya sebagai seorang kanak-kanak kerana tidak dapat disimpulkan dengan penuh
F kepastian bahawa dia seorang dewasa.

(3) Ketua Pengarah Imigresen tidak mempertimbangkan semua faktor relevan dalam mengeluarkan perintah pembuangan pemohon. Perintah pembuangan tersebut dikeluarkan secara tidak wajar. Perintah tersebut dibuat tanpa siasatan atau pertimbangan penuh berdasarkan hal
G keadaan kes. Secara alternatif, pertimbangan yang diberi adalah berdasarkan metodologi dan/atau bukti yang cacat. Oleh itu, perintah pembuangan tersebut tidak sepatutnya menjadi asas untuk pemohon terus ditahan.

(4) Pemohon sudah ditahan selama hampir dua tahun dan penahanannya
H masih berterusan walaupun pemohon akur dengan bidang kuasa Kedutaan Myanmar. Apa yang asalnya satu penahanan tanpa tempoh yang jelas, tanpa pengakhiran nyata, tidak boleh dikatakan seimbang dengan objektif membuat persediaan untuk pembuangan, dan ini juga tidak dilaksanakan dalam kadar segera.

I

(5) Dalam kes ini, *habeas corpus* wajar bahkan telah dikeluarkan. Berikutan perintah *habeas corpus*, mahkamah selanjutnya memerintahkan bahawa, antara lain, (i) pemohon tidak boleh ditangkap semula dan ditahan serta-merta selepas dibebaskan atas alasan dia akan dihantar pulang, sehingga pertimbangan penuh terhadap hal keadaan kesnya diambil oleh pihak berkuasa yang berkaitan. Perintah ini, walau bagaimanapun, tidak mengecualikan pemohon daripada ditahan atas sebab yang sama sekali berbeza (seperti jika dia melakukan kecurian) dan tidak boleh disamakan dengan hak untuk kekal di negara ini; dan (ii) pemohon harus ditempatkan di Yayasan Chow Kit atau mana-mana tempat perlindungan yang setara sehingga pertimbangan penuh kesnya selesai.

Case(s) referred to:

Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***

Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals [2023] 5 CLJ 167 FC ***(refd)***

Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors [2022] 5 CLJ 1 FC ***(refd)***

Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511; [1985] CLJ (Rep) 122 SC ***(refd)***

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***

Jayanathan v. PP [1973] CLJU 56; [1973] 1 LNS 56 FC ***(refd)***

King Kong Leather Wear (BD) Ltd v. Government Of Bangladesh & Ors 29 BLC (2024) 5 ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

Lei Meng v. Inspektor Wayandiana Abdullah & Ors And Other Appeals [2022] 3 CLJ 177 FC ***(refd)***

Minara Bibi Nur Boshor @ Minara Bibu Nur Barshar v. PP [2024] CLJU 1567 HC ***(refd)***

NZYQ v. Minister For Immigration, Citizenship And Multicultural Affairs And Another [2023] 415 ALR 254 ***(refd)***

Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] CLJU 143; [1978] 1 LNS 143 FC ***(refd)***

PP v. Hassan Ali Abdul Razak [2016] 9 CLJ 584 HC ***(refd)***

PP v. Man Ismail [1938] CLJU 54; [1938] 1 LNS 54 HC ***(refd)***

PP v. Saat Hassan & Ors [1988] 1 CLJ 80; [1988] 2 CLJ (Rep) 290 HC ***(refd)***

R (On The Application Of AAA (Syria) & Ors) (Respondents/Cross Appellants) v. Secretary Of State For The Home Department [2023] UKSC 42 ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Re Datuk James Wong Kim Min; Minister Of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min [1976] CLJU 129; [1976] 1 LNS 129 FC ***(refd)***

Re Woolley; Ex parte Applicants M276/2003 (by their next friend GS) [2004] 225 CLR 1

Ruwaida @ Royeda Muhammad Siddiq & Yang Lain lwn. Komandan, Depot Imigresen Belantik, Kedah & Yang Lain [2018] CLJU 2271; [2018] 1 LNS 2271 HC ***(refd)***

Sugenthiran Paramasivam v. Deputy Minister of Home Affairs, Malaysia & Ors [2024] 5 CLJ 549 FC ***(refd)***

Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors [2021] 6 CLJ 199 FC

A *Teo Siaw Peng v. PP [1993] 3 CLJ 412 HC* ***(refd)***
Tun Naing Oo v. PP [2009] 6 CLJ 490 HC ***(refd)***
Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors and Other Appeals [2021] 5 CLJ 581 FC ***(refd)***
Zaw Min v. PP [2016] CLJU 226; [2016] 1 LNS 226 CA ***(refd)***

B **Legislation referred to:**
Convention on the Rights of the Child, art. 22
Corrosive and Explosive Substances and Offensive Weapons Act 1958, s. 6(1)
Courts of Judicature Act 1964, s. 25
Criminal Procedure Code, ss. 4, 365
Federal Constitution, arts. 4(1), 5(1), (2), (4), 8(1)
C Immigration Act 1959, ss. 6(1)(c), (3), 32, 33(1), (2), 34(1), 35
Prevention of Crime Ordinance 1959, s. 15(4)

Other source(s) referred to:
Paul Craig's, *Administrative Law*, 7th edn, 2012 Sweet & Maxwell, section 19-008, p 567
D *Refugee Protection in Southeast Asia: Between Humanitarianism and Sovereignty,* 2025, pp 159-182

For the appellant - Nik Nasrun Nazmi Nik Mohamad & Mohamad Wafiq Hafie; M/s Habibah Nik & Co
For the respondents - Mohd Zain Ibrahim & Rahmath Nisa Segu Alavudin; SFCs

E *[Editor's note: For the High Court judgment, please see Noor Kayes Hashim Ullah @ Noor Hayes Hasimullah lwn. Timbalan Menteri Dalam Negeri, Malaysia & Yang Lain [2025] CLJU 214 (overruled).]*

Reported by Lina E & Najib Tamby

JUDGMENT

F **Nallini Pathmanathan FCJ:**

Introduction

[1] This appeal was filed in respect of the High Court decision to dismiss an application for *habeas corpus*. The appellant is Noor Kayes Hashim Ullah
G @ Noor Kayes binti Hasimullah (referred to as "the applicant", as she was in the High Court proceedings) while the respondents are the Deputy Minister of Home Affairs Malaysia, the Commander of the Tanah Merah Immigration Detention Depot in Kelantan Darul Naim and the Government of Malaysia (referred to collectively as "the respondents"). We heard and
H allowed the applicant's appeal on 9 April 2025, making further orders necessary for the justice of the case. We now give our grounds for our decision.

Salient Facts

I **[2]** The applicant is a female of Rohingya descent. She was arrested in Tumpat, Kelantan Darul Naim sometime in mid-2023. At the time her age was stated to be 16 years. At the material time, she did not possess a registered United Nations High Commissioner for Refugees ("UNHCR") card in Malaysia but held a UNHCR card issued in Bangladesh.

[3] The copy of the Bangladesh UNHCR card in the court records is blurred but the essential details that are discernible on the face of it are that the applicant's purported date of birth is 1 January 2007, that she originates from Myanmar, and that the card was issued on 19 August 2019. However, it does not stipulate an expiry date (unlike the Malaysian UNHCR card).

[4] The applicant was charged under s. 6(1)(c) of the Immigration Act 1959 ("Immigration Act") which criminalises the act of entering Malaysia without a valid pass. Under s. 6(3) of the Immigration Act, this offence is punishable on conviction with a fine not exceeding RM10,000 or imprisonment for a term not exceeding five years or both, and shall also be liable to whipping of not more than six strokes. She pleaded guilty on 8 August 2023 and was sentenced to five months' imprisonment at the Tanah Merah Immigration Detention Depot, Kelantan. She was due to be released in January 2024.

[5] While she was carrying out her term of imprisonment, an order of removal dated 19 November 2023 under s. 33(1) of the Immigration Act and an order of detention pending removal of the same date under s. 34(1) of the Immigration Act were issued by the Deputy Assistant Director of Immigration against her.

[6] As she was not released in January 2024, on 27 February 2024 her lawyer appealed to the Minister of Home Affairs for her release under s. 33(2) of the Immigration Act which provides for appeals to the Minister against orders of removal made under s. 33(1). On the same date, her lawyer also submitted an appeal to the Director General of Immigration ("the Director General") under s. 34(1) which provides for temporary release, which falls within the discretion of the Director General, pending her s. 33(2) appeal. However, no response was received to either letter.

[7] While in detention, the applicant was interviewed by a representative from UNHCR Malaysia which subsequently registered her as a refugee in Malaysia.

[8] On 21 May 2024, the Tanah Merah Immigration Detention Depot wrote to UNHCR to inquire as to whether the applicant held a UNHCR card. UNHCR urgently wrote back in a letter dated the same date, informing that the applicant was a minor aged 17 years old (as opposed to the Immigration Detention Depot's letter to UNHCR which stated the applicant's age as 19 years old). UNHCR confirmed that the applicant is indeed registered with them and pleaded for the applicant's early release.

[9] The UNHCR letter cited the principle of non-refoulement, the contravention of the preamble to the Child Act 2001, and art. 22 of the Convention on the Rights of the Child to which Malaysia is a party. UNHCR went on to highlight that in Shah Alam and Alor Setar, the High Courts have released refugee children from prolonged detention.

[10] In the same letter, UNHCR gave an undertaking to receive her and to ensure that basic care and protection arrangements would be made for her. It attached a temporary one-month UNHCR card for her.

[11] The Malaysian UNHCR card is slightly different from the Bangladesh UNHCR card (for example, it omits the names of the applicant's parents) but the essential details on the Malaysian UNHCR card are that her date of birth was 1 January 2007, that her country of origin is Myanmar, and the date of issue of the card is 3 May 2024. The renewal date was stipulated as 3 June 2024. It is not in dispute that this card expired before the applicant's *habeas corpus* case was heard.

[12] On 30 May 2024, having failed to secure the applicant's release, her lawyer filed the *habeas corpus* application on the basis that she ought not remain under detention due to her refugee status and asserting that her fundamental rights have been violated. However, the High Court dismissed her *habeas corpus* application. The High Court order is the subject of the present appeal.

[13] The High Court gave several grounds for dismissing the *habeas corpus* application. First, the applicant's affidavit in reply was dated before the respondents' affidavits which it purportedly replied to, failing to specify the place it was averred at, and giving rise to doubt as to whether it was properly sworn before a commissioner for oaths. This conclusion was reached because when her lawyer visited her in detention, he was not accompanied by a commissioner for oaths. The lawyer's attempt to obtain an extension of time to file an affidavit to rectify the earlier affidavit in reply was rejected by the High Court as being "an attempt at a second bite of the cherry".

[14] Further, the applicant's attempt to rely on her Bangladesh UNHCR card was rejected because it was not issued by UNHCR Malaysia and its validity was questionable as only a copy of the front side was presented instead of the actual card. The copy of the card, it was held, did not meet the requirements of the Malaysian Immigration Circular dated 24 November 2021. The Circular requires:

(i) a genuine and physically complete UNHCR card, including expired ones;

(ii) a UNHCR card must only be issued by UNHCR Malaysia; and

(iii) this is subject to verification by the Tanah Merah Immigration Depot with UNHCR.

[15] As to the Malaysian UNHCR card, the respondents also relied on the circular and cast doubt on it, as it was issued after the applicant's arrest and was only valid for one month, when normally such cards are issued for a period of two to three years.

[16] The High Court placed importance on a dental examination conducted on 6 June 2023 which estimated her age to be between 18 and 21 years old and did not accept her contention that she was a minor.

[17] In summary, the High Court found the applicant's detention to be lawful as she lacked a valid travel document to enter Malaysia and found no procedural non-compliance with the detention order to justify the issue of a writ of *habeas corpus*.

[18] Before the Federal Court on appeal, the applicant raised several contentions in respect of the High Court grounds, among others:

(i) her UNHCR card could be renewed if she were released and could appear in person at the UNHCR office;

(ii) the UNHCR card cannot be arbitrarily surrendered to the respondents so only a copy was provided;

(iii) the issuance of the UNHCR card while the applicant was in detention was lawful, as the respondents allowed a UNHCR representative to meet her while in detention;

(iv) her release would not prejudice national security, as UNHCR has a detailed monitoring system to verify her identity in the event of involvement in criminal activities; and

(v) the Immigration Circular is not an Act of Parliament or binding law on the court in determining the applicant's case for release based on the facts presented.

[19] The respondents opposed the applicant's appeal on the same grounds as they succeeded in the High Court, further stressing national security grounds and the fact that Malaysia is not a signatory of the 1951 Refugee Convention nor the 1967 Protocol Relating to the Status of Refugees. They submitted that it is the policy of the Attorney General's Chambers and the National Security Council that only foreigners in possession of the UNHCR card before the date of their arrest are entitled to be released and allowed to temporarily reside in this country before being sent to another country.

[20] After hearing the applicant's appeal on 9 April 2025, we unanimously ordered that a writ of *habeas corpus* be issued and ordered other relief. The relevant portion of the broad grounds of our decision and the relief granted are set out below:

> This is our unanimous decision. We order that *habeas corpus* be issued for the following reasons:
>
> (i) The court in hearing a *habeas corpus* application has a duty of inquiry which is heightened due to its constitutionally mandated nature and the present subject matter of personal liberty. Relatedly, the court has a duty not to condone illegality where applicant's personal liberty is implicated;

(ii) There was insufficient consideration of the UNHCR's designation of the applicant as a refugee at risk of serious human rights violations upon her return to her country of origin as well as her possible status as a minor. This is particularly troublesome in light of the weighty nature of the UNHCR's evidence;

(iii) The detention violates section 34 of the Immigration Act, which permits detention only for the period 'necessary for the purpose of making arrangements for [the detainee's] removal'. The detention in the present case goes far beyond what is necessary to achieve this purpose;

(iv) Further, the detention violates the constitutionally enshrined need for the detention to be 'in accordance with law' and the attendant requirement that the detention be proportionate to its objective. In particular, the detention is disproportionate due to the objective of removing the applicant not actually existing and due to the excessive length of the detention.

Keeping in mind the court's wide discretion to mould relief premised, *inter alia*, upon the Federal Constitution, the Courts of Judicature Act 1964, the relevant case law, and the applicant's possible status as a minor, we also grant the following orders:

(i) An order of *habeas corpus* to issue;

(ii) An order that the applicant not be rearrested and detained immediately upon release on the grounds that she is to be deported, until a full consideration of the specific circumstances of her case is undertaken by the relevant authorities;

(iii) To be clear, this does not exclude the applicant from being detained for an entirely different reason, such as if she commits a theft. Further, this does not exclude her possible eventual detention, provided it is lawful in the manner stipulated above, once the respondent has considered her case in full. The above order is not to be equated with a right to remain in the country;

(iv) An order that the applicant should be placed in Yayasan Chow Kit or any equivalent shelter until full consideration of her case is complete.

[21] We now give our full grounds for so deciding.

Our Analysis

[22] The *habeas corpus* application was made pursuant to, *inter alia*, art. 5(2) of the Federal Constitution and s. 365 of the Criminal Procedure Code ("CPC"). The approach of the courts to such applications and appeals arising out of the same circumstances has evolved over the years, from an initial reluctance to interfere, to an increase in judicial scrutiny of the basis of detention.

[23] Every application is important and should be reviewed carefully as the liberty of the person is at stake. Justice Tengku Maimun CJ said in the opening paragraphs of her dissenting judgment[1] in the Federal Court case of *Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals* [2021] 5 CLJ 581; [2021] 3 MLJ 759 ("*Zaidi Kanapiah*"):

> [176]: Article 5(1) of the Federal Constitution ('FC') guarantees that no person shall be deprived of life or personal liberty save in accordance with law. While our constitutional jurisprudence has read into Article 5(1) many other implied rights under the banner of a broad, generous and liberal interpretation, **one must not forget that detention** – especially preventive detention – **is the most basic deprival of personal liberty.**
>
> [177] In this regard, **art. 5(2) is an expressly enumerated provision guaranteeing judicial supervision and protection over those who have been unjustifiably detained in contravention of the law.** The mechanism for its enforcement (itself an inherent judicial power) is statutorily codified in para. 1 of Schedule 1 of the Courts of Judicature Act 1964 ("CJA 1964"). (emphasis added)

[24] The courts have the delicate task to balance the liberty of the individual against the power of the state to exercise the power of detention in the interests of maintaining national security. As stated in the opening paragraph of the Federal Court case of *Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors* [2022] 5 CLJ 1; [2022] 3 MLJ 356 ("*Dhinesh*"):

> [1] Every *habeas corpus* application made to this court brings to the fore the competing concerns of national security and individual liberty, in respect of which the right balance must be achieved, in accordance with the provisions of the Federal Constitution ("FC") and, from a broader perspective, the rule of law.

[25] In light of the foregoing principles, it is clear that *habeas corpus* applications touch on fundamental human rights. Therefore, the respondents' citing of authorities on principles of appellate intervention in relation to a trial judge's findings of fact in urging us to affirm the High Court decision in this case, with respect, is a misapprehension of the court's duty in deciding *habeas corpus* applications and appeals arising out of the same. As we made clear to the respondents' counsel during the hearing before us, a *habeas corpus* application is decided on the affidavits, not in a trial with witnesses testifying in evidence. Sitting in this appeal, we are not assessing the credibility of witnesses and findings of fact premised on the evidence of witnesses. Thus, we found that the principles of appellate intervention with regard to decisions arising out of full trials which were cited by the respondents were not relevant. The court in hearing an appeal from a decision on a *habeas corpus* application is to determine whether the applicant's detention was unlawful, as this would determine whether the High Court had erred in deciding on the *habeas corpus* application.

[26] We shall now discuss the principle to be applied by the courts in deciding *habeas corpus* applications and appeals arising out of the same. We will then consider whether the High Court in the present case applied those principles, and if so, correctly.

Habeas Corpus Duty Of Inquiry

[27] It is important to recall at the outset that the constitutional duty of the court in a *habeas corpus* application is not just to adjudicate but to "inquire" into the deprivation of the detenu's personal liberty (see art. 5(1) of the Federal Constitution; *Lei Meng v. Inspektor Wayandiana Abdullah & Ors And Other Appeals* [2022] 3 CLJ 177; [2022] 3 MLJ 203 ("*Lei Meng*"), at paras. [34] & [75].) The relevant paragraphs of *Lei Meng* (above) are set out below:

> [34] Article 5(2) FC encapsulates a **constitutional right of review** of the detention which the complainant maintains is unlawful. It encompasses a two-fold duty on the High Court, namely:
>
> (a) It places a duty or legal obligation on the High Court or a High Court Judge to inquire into that complaint to ascertain the legality of the detention; and
>
> (b) It requires the High Court or High Court Judge to produce the detainee before the Court and release the detainee, unless the Court is satisfied that the detention is lawful.
>
> ...
>
> [75] In this jurisdiction, Article 5(2) FC makes express and mandatory provision for a court to inquire into a complaint of unlawful detention. **As stated above, it then becomes incumbent upon the court to undertake an inquiry to satisfy itself that the detention is lawful.** It is only if such satisfaction is met that the detention continues. Otherwise, the unlawfully detained person must be released. (emphasis added)

[28] Such a duty of inquiry has special force due to its constitutionally mandated nature as well as the importance of the subject matter of which it concerns.

[29] Indeed, in cases involving the rights of the citizenry, it must be ensured that the court does not condone any illegality (see *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals* [2023] 5 CLJ 167; [2023] 3 MLJ 829 ("*Trellises*") at paras. [547] to [548]). This is of particular importance where the illegality results in the deprivation of one of the most basic rights enshrined in our Federal Constitution. The relevant passages of *Trellises* are set out below:

> [547] This transitions to an important point, namely that *the courts do not condone contraventions of the law, be it under the FT Act or any other law. The fact that a material issue was not disclosed by the parties does not preclude this court, upon becoming appraised of the issue, whether from its own research or it having been pointed out by the parties, to raise and rule on the same, at any stage of the proceedings, particularly where it relates to a possible contravention of the law.*
>
> [548] *This is an established position of law, particularly in relation to illegality. Illegality encompasses contraventions of statute ...* (emphasis added)

[30] We are of the view that this appeal raises the following issues:

(i) issue 1: Is the detention of the applicant in accordance with the Immigration Act?

(ii) issue 2: Whether there was a transgression of constitutionally permissible limits?

Issue 1: Is The Detention Of The Applicant In Accordance With The Immigration Act?

[31] While the decision to remove is not the decision challenged in the present case, it forms the substantive basis of the applicant's detention. Put simply, s. 34 of the Immigration Act authorises detention pending removal from Malaysia; if the order of removal is invalid, it follows that the detention itself is invalid. Therefore, it is permissible for this court to look to the removal order which forms the basis for the detention order. The latter, in turn is the subject matter of the present *habeas corpus* appeal. This is borne out by case law (see *Zaidi Kanapiah* (above) and *Lei Meng* (above)).

[32] While *Zaidi Kanapiah* (above) and *Lei Meng* (above) made pronouncements in the context of detentions subsequent to the date of filing the *habeas corpus* application, the above arguments accord with the principle that succeeding orders for detention should be regarded as "one overarching transaction" and not "discretely ... in silos". In para. 128 of *Lei Meng*, the Federal Court stated:

> [128] When a detention which is the subject matter of challenge is considered in this context, it follows that as the focus is on the duty of the Court to inquire into the legality of the detention the fact that the *de facto* custody and detention of the applicant has passed on to a different gaoler or detaining authority, but under the same preventive detention legislation or even other detention, that cannot in itself prohibit the constitutional review from being undertaken by the Court. *That is why Zaidi Kanapiah referred to the several stages of detention under different sections of the same legislation as amounting to one overarching transaction. And this is amply supported by Ezam as well as Theresa Lim which represent the more legally coherent legal proposition.* (emphasis added)

[33] While not explicitly said in respect of detention orders, Justice Syed Refaat Ahmed in a Bangladesh Supreme Court case, *King Kong Leather Wear (BD) Ltd v. Government Of Bangladesh & Ors* 29 BLC (2024) 5, spelt out how to treat administrative decisions that are premised upon each other:

> ... it is this Court's finding that SRO No. ... read with all superseding SROs down to the impugned SRO No. ... together represent an organic whole in which the contents of each preceding and repealed SRO have dissolved *into or merged as necessary seamlessly with each successive one with the last most recent SRO representing to this Court the final manifestation of an illegality as has continued unabated all through. Such wrong, found to be shorn of all legal basis, ... once detected and struck down by this Court has the effect of bringing down the entire edifice of illegality from start to finish and it matters not that each constituent statutory regulatory order of that organic whole has not individually been impugned for the Court's singular attention and remedial action.* It is, therefore, the organic whole that this Court is concerned with in such a scenario and it is quite irrelevant that a single component has not been impugned when the organic whole is declared as representing a gross illegality.
>
> (emphasis added)

[34] This brings us to the issue of whether the Director General erred in issuing the order of removal dated 19 November 2023 against the applicant. Did the Director General exercise his authority to issue the order of removal after a proper consideration of all the relevant factors, including the claim that the applicant was a minor and a refugee recognised by UNHCR? If this was not done, then there is no basis for the applicant to be detained pending her removal.

[35] If the applicant's detention is not in accordance with the law, it is a fit and proper case for the court to intervene. As Lee Hun Hoe (Borneo) CJ said in the Federal Court case of *Re Datuk James Wong Kim Min; Minister Of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min* [1976] CLJU 129; [1976] 1 LNS 129; [1976] 2 MLJ 244 ("*Re Datuk James*"):

> Preventive detention is the detention of a person without trial as opposed to punitive detention where a person is detained after a trial in a Court of law in which he is proved to have committed an offence punishable under certain provisions of the penal law. Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguard that is provided by law against the improper exercise of such power must be zealously watched and enforced by the Court. In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an

applicant in applying for a writ of *habeas corpus* is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. See *Ex Parte Johannes Choeldi & Ors* [1960] CLJU 25; [1960] 1 LNS 25.

One of the functions of the Courts is to interpret the law. An inherent part of their function is to see that the executive acts within the law and does not encroach unnecessarily into the realm of liberty of the subject. In fact, Art. 5(1) of the Constitution guarantees that no person shall be deprived of his liberty except in accordance with the law. If this constitutional guarantee is to have any real meaning at all, then it is imperative that the Courts should intervene whenever the liberty of the subject is encroached upon not in accordance with the law. (emphasis added)

Insufficient Consideration Of Relevant Factors

The Meaning Of "Shall Be Liable To Be Removed"

[36] The Director General's power to issue the order of removal dated 19 November 2023 stems from s. 32 of the Immigration Act which stipulates that anyone convicted under s. 6 "shall be liable to be removed" by an order of the Director General. Notably, this means that someone convicted of a s. 6 offence can be removed, but it does not mean they should be removed. This is supported by the phrasing in the Immigration Act that one only becomes "liable" to be removed; the word "liable" would become redundant if s. 32 was interpreted as meaning a non-citizen would be automatically deported upon conviction under s. 6.

[37] Any other interpretation of the phrase "shall be liable to" would offend the rule against surplusage, as set out by Eusoffe Abdoolcader SCJ in the case of *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122; [1985] 2 MLJ 35:

The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. *On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded.* (emphasis added)

[38] On a plain English language reading of the phrase, the definition of the adjective "liable" from the *Oxford Advanced American Dictionary*[2] set out below indicates a possibility of punishment by using the word "likely" as opposed to "definitely or certainly" which would indicate a certainty that punishment is mandated:

4. liable to something - **likely to be** punished by law for something. (emphasis added)

[39] Further, a consideration of case law on s. 6(3) of the Immigration Act, which is the punishment section for the offence committed under s. 6(1), is also instructive. Section 6(3) uses the term twice, first in relation to a fine

– "shall, on conviction, be liable to" and secondly in relation to whipping – "shall also be liable to". Cases on s. 6(3) such as *Tun Naing Oo v. PP* [2009] 6 CLJ 490 interpreted the use of this phrase as discretionary, not mandatory, as follows:

> [11] *The DPP in his submissions also agreed that whipping is not mandatory under s. 6(3) of the Act. It is within the discretionary powers of the court to decide whether to impose whipping or otherwise.*
>
> [12] *The court agrees with both learned counsel for the applicant and the DPP that "shall … be liable" has been interpreted and decided in many cases that it is discretionary and not mandatory* (see Harun J's decision in *PP v. Wahab* [1964] CLJU 150; [1964] 1 LNS 150; [1964] 30 MLJ 265, the Federal Court case of *Jayanathan v. PP* [1973] CLJU 56; [1973] 1 LNS 56; [1973] 2 MLJ 68, *PP v. Man b. Ismail* [1938] CLJU 54; [1938] 1 LNS 54 and *Leong Kok Huat v. PP* [1998] 4 CLJ 106). *Therefore, the punishment of whipping under s. 6(3) of the Act is entirely left to judicial discretion.* (emphasis added)

[40] The same interpretation has been applied by the courts to statutes apart from the Immigration Act. For example, in the case of *PP v. Hassan Ali Abdul Razak* [2016] 9 CLJ 584 ("*Hassan Ali*"), the court had to consider the phrase "shall be guilty of an offence and on conviction be liable to" used in s. 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958. This court in turn referred to the case of *Teo Siaw Peng v. PP* [1993] 3 CLJ 412 where Richard Malanjum J (as His Lordship then was) considered the phrase "on conviction be liable to imprisonment" in s. 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance 1958 and held, "As for the sentence passed I note that in passing the sentence the learned trial Magistrate has concluded that s. 6(1) of the Act carries a mandatory imprisonment sentence. But on reading s. 6(1) I do not think so …".

[41] In *Hassan Ali* (above), Zulkifli Bakar J held that "shall be liable" does not mean that it is mandatory, as opposed to "shall be punished with", referring to other cases in his decision:

> [13] In my considered view, the use of *the words "shall be liable" in the law must be distinguished from the words "shall be punished with". With the words "shall be punished with" used, it gives no discretion to the court. However, the court is vested with the discretionary power to pass sentence of imprisonment not more than the maximum as provided in the law when the phrase "be liable" is used. It contained no mandatory connotation; likewise in this case.* The word "liable" was explained by Brown J in the case of *Ng Chwee Puan v. Regina* [1953] CLJU 60; [1953] 1 LNS 60; [1953] MLJ 86[3] as follows:
>
> > But the word *"liable" – contains no obligatory or mandatory connotation. Sitting in this Court, with a table fan blowing directly on to me, I am "liable" – to catch a cold. But it does not follow that I shall.*

> [14] Since the words "be liable" is used in the said s. 6(1) of the Act, this court ruled that *it is meant to allow the court with a discretion to pass sentence as it thinks fit after assessing the available evidence and particular facts of the case. In other words, imprisonment is not mandatory* (*PP v. Wahab* [1964] CLJU 150; [1964] 1 LNS 150; [1964] 1 MLJ 265; *PP v. Lee Ah Sam* [1949] CLJU 62; [1949] 1 LNS 62; [1949] 1 MLJ 236; *Jayanthan v. PP* [1973] CLJU 56; [1973] 1 LNS 56; [1973] 2 MLJ 68). (emphasis added)

[42] The Federal Court case of *Jayanthan v. PP* [1973] CLJU 56; [1973] 1 LNS 56; [1973] 2 MLJ 68 ("*Jayanthan*") pertained to an offence under s. 15(4) of the Prevention of Crime Ordinance 1959. The Federal Court in determining the interpretation of "shall be liable" referred to the decision of *PP v. Man Ismail* [1938] CLJU 54; [1938] 1 LNS 54 ("*Man*") where Aitken J contrasted the legislature's choice of phrase "shall be liable to" as opposed to "shall be punished with imprisonment". Aitken J held:

> It would also seem that the learned Magistrate, who tried this particular case, was under the impression that because the section provides that every person found guilty of an offence against it "shall be liable to imprisonment for six months", therefore he was *compelled* to pass some sentence of imprisonment on such a person *however many mitigating circumstances might be present. If that was his impression, then in my opinion he was under an entirely wrong impression as to the meaning of the words "shall be liable to". To my mind they give the Court an absolute discretion as to whether it shall award a sentence of imprisonment or deal with the accused under and in accordance with the probationary provisions of s. 294 of the Criminal Procedure Code. If the legislature had intended that all persons convicted of an offence against this s. 3 (a) of the Vagrants and Decrepit Persons Enactment should be sent to prison, whatever the circumstances may be, it would have used the expression "shall be punished with imprisonment", which is to be found so frequently in our Penal Code.* (emphasis added)

[43] Returning to the case at hand, we are of the view that the use of the phrase "shall be liable to be removed" in s. 32 of the Immigration Act confers a discretionary power upon the court that must be utilised with care. As being liable to be removed is not mandatory, it would be necessary for the authorities, in this case the power lies with the Director General, to consider relevant factors in deciding whether to order the applicant's removal.

[44] It is trite law that the lack of sufficient consideration of relevant factors is a ground which invalidates the decision of a public authority. For example, see Paul Craig's textbook *Administrative Law*, 7th edn, 2012 Sweet & Maxwell where it is stated at section 19-008 p. 567: "The courts have, ever since the origins of judicial review, exerted control over discretion to prevent power from being misused or abused". *Craig* (*supra*) goes on to say at section 19-010 p. 572: "The second principal method of controlling the exercise of discretion is relevancy: a decision will be declared *ultra vires* if it is based upon irrelevant considerations or relevant considerations are not taken into account".

[45] Most pertinently, *Craig* (*supra*) says at section 21-003 p. 644:

> The need for evidence and reasoned decision-making is particularly important given that much decision-making will take place within "bounded rationality". It will normally be incremental. Officials rarely have the full range of choices before them. Since officials will often not be viewing the whole picture comprehensively, it is all the more important that the reasons for a particular course of conduct be articulated. Moreover, *while we should be aware that no official can ever literally take "all" relevant considerations into account, the courts have a role in redressing a bureaucratic tendency to adopt a very narrow bounded rationality, which thereby forecloses policy choices.* (emphasis added)

[46] Of primary concern in this appeal is the possibility that the decision to remove the applicant was made mechanically without sufficient consideration of her unique situation. This lack of sufficient consideration is evidenced by the fact that the applicant was detained on 19 November 2023 pending a removal decision, only for the removal order to be issued that same day.

The Affidavit Of Noor Kayes

[47] The respondents submitted that there was no evidence from the applicant before the court as the affidavit by the applicant was not properly affirmed before a commissioner for oaths. Further, they emphasised that the commissioner for oaths in question was struck off from service for not following regulations. There were only the unchallenged respondents' affidavits before the court, warranting a court decision in the respondents' favour.

[48] We find that the courts have inherent power to permit matters to depart from procedural rules due to the gravity of the injustice that would be caused otherwise. Section 4 of the CPC which is titled "Saving of powers of High Court" states that "Nothing in this Code shall be construed as derogating from the powers or jurisdiction of the High Court". On s. 4 of the CPC, Mahadev Shankar J held in the case of *PP v. Saat Hassan & Ors* [1988] 1 CLJ 80; [1988] 2 CLJ (Rep) 290 ("*Saat Hassan*"):

> Section 4 of the Code states that 'nothing in this Code shall be construed as derogating from the powers or jurisdiction of the High Court.' In my view *this section expressly preserved the inherent jurisdiction of the High Court to make any order necessary to give effect to other provisions under the Code or to prevent abuse of the process of any Court or otherwise to secure the needs of justice.*
>
> ...
>
> *In every case the concern of the Court is that substantial justice may be done in the matter.*
>
> ...

> The inherent jurisdiction of the Court and for that matter its powers to permit matters to be done in a manner which falls short of strict compliance with the established rules of the procedure, should only be sparingly exercised and *where the injustice that would be caused if the Court fails to act would be very grave, and there is no other provision in the law which the applicant could have sought relief.* (emphasis added)

[49] We find that it is untenable for the respondents to suggest their affidavits are deemed unchallenged and that the applicant's case be dismissed merely on a technical non-compliance. We are of the view that due to the imbalance of power between the Immigration Department which has much at its disposal and a refugee who is a minor alone in detention, a technicality as to the swearing of the affidavit should not be raised to prevent us from considering all relevant facts. On the contrary, the Immigration Department ought to have facilitated the attestation of her affidavit before a Commissioner for Oaths rather than taking the opportunity to have her *habeas corpus* application thrown out on a technicality in order to avoid a full ventilation of the merits of her case.

[50] However, our judgment should not be taken as condoning the improper swearing of an affidavit. Each case turns on its individual facts. This is a grave case which involves the liberty of a minor. These extreme circumstances allow us to exercise our inherent jurisdiction to secure the needs of justice, as the court stated in *Saat Hassan* (above). Alternatively, the High Court could simply have asked that the affidavit be refiled but chose not to do so. As we noted above at para. 13, in the High Court proceedings, the applicant's lawyer sought an extension of time to file an affidavit which would have rectified the disputed affidavit in reply, but the High Court did not allow this application. This amounted to an improper exercise of discretion, given the circumstances.

The Role Of The Judiciary As A Check And Balance On The Executive

[51] The courts have an important role to play in a country where separation of powers is part of the basic structure of our Federal Constitution. In *Dhinesh* (above), the Federal Court explained the effect of art. 4(1) of the Federal Constitution which allows the courts to act as a check and balance over the legislature and the executive, as follows:

> By providing for the ability to render enacted law void if inconsistent with the FC, art. 4(1) FC also clearly houses the doctrine of the separation of powers. It ensures that where the Legislature enacts laws which are outside the purview of the FC, such laws are void. This effectively provides a check and balance mechanism in relation to the division of power between the arms of Government. Neither the Legislature nor the Executive should enact or execute laws that are inconsistent with the FC. In this context it is not purely an issue of the division of powers, but rather undertaking the highest responsibility for maintaining the state and social

A order. This separation is maintained by the mechanism of constitutional judicial review. Judicial review lies at the heart of the FC as it enables or facilitates the operation of the doctrines of the separation of powers as well as ensuring that the basic features and thus the fundamental identity of the FC is retained.

B **[52]** In the Federal Court case of *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145 ("*Indira Gandhi*"), Zainun Ali FCJ stated:

> [120] The power of the Judiciary to ensure the legality of executive action is consistent with its constitutional role in a framework based on the
C separation of powers, which ... forms the basic structure of the Constitution.

[53] Therefore, the courts exercise powers of judicial review, of which writs of *habeas corpus* are a subset. The government may well say that the power to deport persons has to do with national security, therefore the courts
D ought not interfere with the exercise of discretion by the immigration authorities to deport persons. Under the doctrine of separation of powers, it is not for the courts to interfere with the policy aims of the Executive, as acknowledged in the postscript to the case of *Dhinesh* (above):

> The courts are not equipped to deal with matters of policy and do not
E interfere in the same, as such matters fall within the purview of the other branches of Government, particularly the Executive.

[54] Thus, the courts interpret and apply the law and in doing so, do not encroach into evaluating the merits of policy decisions. However, in carrying out the function of a check and balance on executive action, the courts would
F consider whether the exercise of discretion by the executive was lawful and proper. Judicial intervention in executive decisions would be warranted under specific circumstances, such as *ultra vires* or unconstitutional acts by the executive, executive decisions void for *Wednesbury* unreasonableness and procedural impropriety in decision-making.

G **[55]** In *Indira Gandhi* (above), Zainun Ali FCJ cited the judgment of Raja Azlan Shah Ag CJ (as His Royal Highness then was) in the Federal Court case of *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] CLJU 143; [1978] 1 LNS 143; [1979] 1 MLJ 135, as follows:

> H ... Unfettered discretion is a contradiction in terms. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint, where it is wrongly exercised, it becomes the duty of the court to intervene. The courts are
I the only defence of the liberty of the subject against departmental aggression ...

The Merits Of The Case

[56] Going on to the merits of the applicant's case, the Immigration Act does not detail exhaustively or expressly the considerations that the Director General must take into account when removing an individual from Malaysia; in other words, the Immigration Act is ambiguous on this point.

[57] Suffian LP in a *habeas corpus* appeal, *Re Datuk James* (above) stated that ambiguous preventive detention laws which affect the liberty of the person should be interpreted against the authorities and in favour of the citizen, as follows:

> These laws affect the liberty of the subject and in the case of doubt or ambiguity they should be interpreted against Authority and in favour of the citizen.

[58] Further, where a statute is ambiguous, the reading of a statute which is in conformity with customary international law is to be preferred. The Federal Court stated thus in the case of *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 6 CLJ 199; [2021] 5 MLJ 209 ("*Sundra Rajoo*") at para. [45]:

> [45] The point is that if domestic legislation directly conflicts with international law, then the Courts of a dualist system must give priority to domestic law over international law. Any breach of the international law would be as a result of the conduct of the Legislative and Executive arms of Government. However, where the legislation is ambiguous and capable of an interpretation which favours international law, the Courts ought not to put the State or the other branches of Government in a position which would render them in breach of international law whether it be conventional international law (treaty law) or customary international law.

[59] This brings us to a consideration of whether the Director General properly exercised his discretion in making the order for the removal of the applicant.

Did The Director General Properly Exercise His Discretion?

[60] We are of the view that the relevant factors that should have been, but were not taken into consideration by the Director General, are as follows:

(i) the status of the applicant as assessed by UNHCR; and

(ii) the possibility that the applicant was a minor at the time when she was detained.

[61] We found that in making the order for the applicant's removal, the Director General did not sufficiently consider the UNHCR's designation of the applicant as a person of concern who was at grave risk if she was to be returned to her home country. Malaysia's approach to refugee-seekers is to

resettle them in a third country. However, it cannot be said in this case that the applicant was being detained to facilitate the procedure of resettlement as it appears that the authorities were intending to send her back to Myanmar where she would be at risk of persecution.

[62] Notably, the Director General averred that they were simply following the policy of the Malaysian Department of Immigration that said a UNHCR card was needed from Malaysia and cannot be issued during the period of detention. This was an internal policy which the applicant had no awareness of at the material time, but more importantly, there was no consideration of the individual circumstances of the applicant's case.

[63] Further, it was made clear in a recent decision by the UK Supreme Court that significant weight should be given to UNHCR's evidence. This was stated in *R (On The Application Of AAA (Syria) & Ors) (Respondents/Cross Appellants) v. Secretary Of State For The Home Department* [2023] UKSC 42 ("*AAA*") when the court considered the policy of the Secretary of State that certain people seeking UK asylum would be sent to Rwanda to claim asylum there. The unanimous judgment of the court was jointly written by Lord Reed and Lord Lloyd-Jones and the relevant passage is as follows:

> 64. *The Divisional Court's view that the evidence of UNHCR carried no special weight was a further error. Of course, the weight to be attached to evidence is always a matter for the court, and will depend on the circumstances. However, a number of factors combined in the present case to render the evidence of UNHCR of particular significance.*
>
> 65. *The first relevant factor is the status and role of UNHCR. It is entrusted by the United Nations General Assembly with supervision of the interpretation and application of the Refugee Convention:* see the Statute of the Office of the United Nations High Commissioner for Refugees, annexed to UN General Assembly Resolution 428(V), 14 December 1950. Under article 35 of the Refugee Convention, states parties undertake to co-operate with UNHCR in the exercise of its functions, and to facilitate its duty of supervising the application of the provisions of the Convention. Reflecting those circumstances, *it is well established that UNHCR's guidance concerning the interpretation and application of the Refugee Convention "should be accorded considerable weight": Al-Sirri v. Secretary of State for the Home Department* [2012] UKSC 54; [2013] 1 AC 745, para 36. In *IA (Iran) v. Secretary of State for the Home Department* [2014] UKSC 6; [2014] 1 WLR 384, para 44, this court stated *that "the accumulated and unrivalled expertise of this organisation, its experience in working with governments throughout the world, the development, promotion and enforcement of procedures of high standard and consistent decision-making in the field of refugee status determinations must invest its decisions with considerable authority".*
>
> 66. *The second factor, mentioned in that dictum, is UNHCR's expertise and experience. That factor was also emphasised by this court ... when considering the approach which should be adopted to evidence provided by UNHCR in relation to the risks involved in removing asylum seekers to another country.* Lord Kerr of

Tonaghmore, with whose judgment the other members of the court agreed, referred (para 72) to *"the unique and unrivalled expertise of UNHCR in the field of asylum and refugee law",* and expressed agreement with the observations of Sir Stephen Sedley in the court below [2013] 1 WLR 576, para 41, which he quoted at para 71:

> It seems to us that there was a reason for [the European Court in *MSS v. Belgium and Greece*] according the UNHCR a special status in this context. The finding of facts by a court of law on the scale involved here is necessarily a problematical exercise, prone to influence by accidental factors such as the date of a report, or its sources, or the quality of its authorship, and conducted in a single intensive session. The High Commissioner for Refugees, by contrast, is today the holder of an internationally respected office with an expert staff (numbering 7,190 in 120 different states, according to its website), able to assemble and monitor information from year to year and to apply to it standards of knowledge and judgment which are ordinarily beyond the reach of a court. In doing this, and in reaching his conclusions, he has the authority of the General Assembly of the United Nations, by whom he is appointed and to whom he reports. It is intelligible in this situation that a supranational court should pay special regard both to the facts which the High Commissioner reports and to the value judgments he arrives at within his remit.

67. As was mentioned in that passage, considerable weight is given to the evidence of UNHCR by the European Court. In *MSS v. Belgium and Greece*, for example, the court attached "critical importance" (para 349) to UNHCR's concerns about the treatment of asylum seekers in Greece. *In Ilias v. Hungary, UNHCR's reports were described as "authoritative"* (para 141, quoted at para 45 above). For the reasons we have explained, *it is unsurprising that that should be so; and it is a factor which is relevant to the approach of domestic courts when considering asylum questions under the ECHR.*

68. *UNHCR's evidence will naturally be of greatest weight when it relates to matters within its particular remit or where it has special expertise in the subject matter. Its evidence in the present case concerns matters falling within its remit and about which it has undoubted expertise.* … [Note: the court went on to consider the UNHCR's involvement in Rwanda, omitted due to length.]

…

70. Drawing these threads together, it is apparent from the factors which we have mentioned and the authorities which we have cited that *particular importance should have been attached to the evidence of UNHCR in the present case. That is not to say that its evidence should necessarily be decisive or pre-eminent. In the circumstances of the present case, however, its evidence on significant matters of fact is essentially uncontradicted by any cogent evidence to the contrary, as the Court of Appeal explained (eg at para 136). It should not have been treated as dismissively as it was by the Divisional Court.* (emphasis added)

[64] We are of the view that UNHCR has a sufficiently long presence in Malaysia to warrant giving their evidence due consideration in deciding the applicant's case. It is of particular relevance to this case as the applicant is a Rohingya and the UNHCR's work in Malaysia in the recent years centres on handling people fleeing the instability in Myanmar. See the textbook titled "*Refugee Protection in Southeast Asia: Between Humanitarianism and Sovereignty*" (2025) pp. 159 to 182, specifically, Chapter 6 *"The (Un)Official Refugee Protection Regimes in Malaysia: What Is the Way Forward?"* by Gerhard Hoffstaedter & Aslam Abd Jalil[4] which states:

> The UNHCR began its work in Malaysia in 1975, following the influx of refugees who came from Vietnam at the end of the Second Indochina War. Initially, the Malaysian government asked the UNHCR to assist them with handling the growing number of arrivals. Thus began a long working relationship between the Malaysian government and the UNHCR ... It has primarily spent the last two decades conducting refugee status determination (RSD) to register asylum seekers and refugees from Myanmar.

[65] In light of the respondents' submission that the UNHCR card ought not be considered as it was issued after she was detained and had not been renewed after it expired, we have to consider the effect of her UNHCR card. The UNCHR website acknowledges that the UNHCR card has no formal legal value in Malaysia[5]. The UNHCR website also states:

> The purpose of identity cards or certificates issued by UNHCR is to provide refugees with a document that demonstrates their identity and refugee status according to UNHCR, which can in many cases facilitate contact with official actors and reduce related protection risks, including detention and refoulement. Such documents can also help refugees access services such as healthcare and education, and rights including freedom of movement and access to work.[6]

[66] Therefore, it is undisputed that the UNHCR card confers no legal rights and is declaratory of the holders' identity and refugee status.

[67] The lawyer for the applicant cited case law where the courts in this country have given recognition that the effect of holding a UNHCR card is an indicator of the holder's status as a refugee. In the Court of Appeal case of *Zaw Min v. PP* [2016] CLJU 226; [2016] 1 LNS 226 ("*Zaw Min*"), the court referred to a UNHCR letter confirming that the appellant was an asylum-seeker and held that "perayu adalah seorang pemohon taraf pelarian (refugee) dalam perlindungan UNCHR ... Ini jelas menunjukkan perayu bukan seorang pendatang haram." This position was followed in subsequent High Court cases.

[68] In the recent case of *Minara Bibi Nur Boshor @ Minara Bibu Nur Barshar v. PP* [2024] CLJU 1567 ("*Minara Bibi*"), the High Court judge allowed the applicant's appeal against her conviction in the Magistrates' Court for the

same offence as in the present case. In doing so, Hasbullah Adam J discussed the effect of a UNHCR card, cited the preamble to the Child Act 2001 and held that although Malaysia is not a signatory to the 1951 Convention relating to the Status of Refugees, Malaysia has ratified the Convention on the Rights of the Child which states in art. 22 that:

> States Parties shall take appropriate measures to ensure that *a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his parents or her parents or by any other person, receive appropriate protection and humanitarian assistance* in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties. (emphasis added)

[69] *Minara Bibi* (above) referred to the earlier Court of Appeal case of *Zaw Min* (above) and held that since the applicant held a UNHCR card, she is not an illegal immigrant, thus setting aside the conviction of the applicant for an offence under s. 6(1)(c) of the Immigration Act:

> [24] Oleh yang demikian, selaras dengan keputusan Mahkamah Rayuan di atas, Mahkamah ini berpendapat bahawa semasa tarikh pertuduhan pada 19.9.2022, *sebagai pemegang kad UNHCR, Pemohon bukan seorang pendatang/imigran haram.*
>
> [25] Dalam hal ini, Mahkamah ini berpendapat bahawa pada tarikh 19.9.2022, *semasa pertuduhan ke atas Pemohon dibuat di Mahkamah Kanak-Kanak, Pemohon tidak boleh dianggap sebagai telah memasuki Malaysia dengan menyalahi undang-undang kerana 'kebenaran' diberikan kepada Pemohon melalui pendaftarannya sebagai Person of Concern dan sekali gus sebagai pemegang kad UNHCR untuk berada di Malaysia secara sah.* (emphasis added)

[70] In *Ruwaida @ Royeda Muhammad Siddiq & Yang Lain lwn. Komandan, Depot Imigresen Belantik, Kedah & Yang Lain* [2018] CLJU 2271; [2018] 1 LNS 2271; [2019] 4 AMR 619, the High Court Judge held that the detention of the applicants who were Rohingya minors contravened art. 22 of the Convention on the Rights of the Child and the Child Act 2001. In that case, the breach was egregious because they were detained when their boat arrived in Langkawi but were not brought before a Magistrate within 24 hours to have their detention authorised. 13 days after their arrival in Malaysian waters, the Deputy Assistant Director of the Kedah Immigration Department issued orders for removal and detention orders in respect of the applicants. The High Court Judge ordered the release of the applicants and allowed their prayer to be placed in a shelter, namely Yayasan Chow Kit, and bail of RM500 each applicant with one surety (a Malaysian citizen).

[71] The applicant's lawyer relied on the foregoing cases to submit that she is a child who should be protected by court and therefore the High Court erred in dismissing her *habeas corpus* application.

[72] We find on the above authorities that the applicant in the present case should not be forcibly deported without a due consideration of her circumstances. In this respect, the two documents from UNHCR which ought to have been considered are the UNHCR card and the UNCHR letter dated 21 May 2024.

[73] At the time of detention, the applicant did not have a Malaysian UNHCR card but during detention she was issued a temporary UNHCR card. As argued by the applicant's lawyer, the veracity of the UNHCR card should have been given due consideration by the respondents because it was personally handed over to the applicant by a representative from UNHCR. In addition, we have the confirmation of the UNHCR representative who attended the hearing before us that the applicant is under their protection. It is indisputable that now, the applicant does have UNHCR status.

[74] The letter from UNHCR dated 21 May 2024 stated that it was the assessment of the UNHCR that the applicant ought to be released due to the potential detrimental effect from long-term detention. UNHCR also pleaded that she should not be deported to any country where she would be at risk of persecution. We are of the view that the above assessment of the applicant's condition ought to be accorded due consideration following the approach in *AAA* (above), as the UNHCR in Malaysia has been deeply involved in handling the Rohingya people who have fled to Malaysia from Myanmar.

[75] Besides, there was no full and proper consideration of whether the applicant was a minor. This is particularly problematic considering that if she was, Malaysia's obligations under the Convention on the Rights of the Child may have been relevant in determining how to treat her. Even beyond international law, it is clear from our case law and from general common sense that the welfare of a minor must be considered where it is at risk (see *Indira Gandhi* (above)).

Use Of Dental Evidence To Determine Age As Opposed To The Age Stipulated In The UNHCR Card

[76] Both the Bangladesh and the Malaysian UNHCR cards stated the applicant's date of birth as 1 January 2007, which would make her a minor at the time of her detention. In deciding the issue of whether the applicant was a minor at the time of her detention, the High Court and the respondents in this appeal placed reliance on the dental examination of the applicant on 6 June 2023 which found her to be between 18-21 years of age. However, as we said in court to the respondents, this dental report is not a conclusive finding on the age of the applicant, it is merely an estimate.

[77] There are different methodologies used to determine age, with varying results. Further, what is determined is an estimation of age, and is not conclusive. Different researchers have different methods for age estimation

but there is no "fool-proof method".[7] It is also noted that the use of dental x-rays to determine the age of asylum seekers in the UK has been dropped by the UK after much protest against the idea. The British Dental Association[8] had opposed such a method because it is not an accurate method for assessing age (see also the statement by Paula Waterhouse, president of the British Society of Paediatric Dentistry (BSPD) in an article by Rowan Thomas titled "Dental x-rays may now be used to determine age of asylum seekers"[9] dated 16 January 2024).

[78] Therefore, the results of the dental examination ought not to have been given the weight which the High Court did, bearing in mind that only an estimated age range is produced. The finding of the dental examination that the applicant is of between 18-21 years of age is close enough that she could conceivably have been a minor at the material time, which is the time of her detention in mid-2023. That being the case, the authorities should have erred on the side of caution and treated her as a child as it could not be concluded with all certainty that she was an adult.

[79] For the foregoing reasons, we find that the Director General had not considered all the relevant factors in issuing the order for the applicant's removal. That being the case, the order of removal dated 19 November 2023 was improperly issued. If the authorities are minded to proceed with the deportation of the applicant, the Director General should properly exercise his mind to the circumstances of the applicant's case before making another order of removal.

[80] Having made the above finding, it follows that the order of removal dated 19 November 2023 was made without according to full investigation or consideration to the circumstances of the instant case. Alternatively, the consideration given was based on flawed methodology and/or evidence. Therefore, the order of removal dated 19 November 2023 ought not form the basis for the applicant to continue to be held in detention. We now turn to consider whether the applicant's detention is in accordance with the law.

Length Of Time In Detention

[81] As stated earlier, the applicant was held on pre-trial remand for 2.5 months, served her sentence for approximately three months, and was then, on the date of her release from prison on 19 November 2023, detained again on the same day – initially under s. 35 of the Immigration Act, pending a decision on her removal from Malaysia, and later the same day under s. 34 of the Immigration Act, which provides for detention pending actual removal from Malaysia. She remained in detention to the date of her appeal to the Federal Court.

[82] The detention of the applicant was pursuant to s. 34 of the Immigration Act which authorises detention pending removal from Malaysia "… for such period as may be necessary for the purpose of making arrangements for his removal".

[83] During the course of the hearing of the appeal, we inquired as to the respondents' understanding of the meaning of the above phrase. We put our view to the respondents that s. 34 does not allow the authorities to detain people indefinitely and that the use of the words "such period as may be necessary" shows that Parliament envisaged a short period of detention, certainly not several years long.

[84] The applicant in the present case has been detained under s. 34 for approximately 16 months. If pre-trial remand and the detenu's sentence is included, she has been detained for an uninterrupted period of approximately 21.5 months. Therefore we posed the question to the respondents whether it is necessary to detain the applicant for nearly two years in order to make the requisite arrangements for her deportation. It is incomprehensible why the applicant was detained for that period of time, especially viewed in the light of UNHCR's letter dated 21 May 2024 where UNHCR undertook to receive the applicant and care for her in order that she may be released from detention.

[85] The respondents explained that for the purposes of deportation, the involvement of the embassy of the country that the detenu is to be sent to is necessary and this is what takes a considerable amount of time. The respondents went on to inform us that in this case, the applicant refused to admit she was a citizen of Myanmar and therefore cannot be deported. In such situations, persons will be held until they admit that the relevant embassy holds jurisdiction over them.

[86] Apart from that, the respondents submitted that the applicant's detention was valid as every 14 days, she was brought before a Magistrate for a renewal of her detention pursuant to art. 5(4) of the Federal Constitution. We are of the view that simply following this procedure does not legalise the applicant's detention as the heart of the matter under consideration here is whether s. 34 of the Immigration Act was complied with. What was the purpose for the inordinate length of time with which she was detained?

[87] We find that the word "necessary" in s. 34 of the Immigration Act indicates that detention is only legal where this detention is required for the purpose of making arrangements for removal; it is not sufficient that the detenu is detained simply because they are unable to make arrangements.

[88] It is apposite to recall that the burden of proving the detention is lawful is 'constitutionally thrust' upon the detaining authority (see *Zaidi Kanapiah* (above) at paras. [179] & [180]); in the present legislative context, this means that it is for the detaining authority to prove that the period of detention is necessary for the purpose of making arrangements for removal.

> [179] I remind myself of the cardinal principles on *habeas corpus* that **the burden to justify the legality of a detention rests on the detaining authority** (see the pronouncements of this Court in *Chua Kian Voon v. Menteri Dalam Negeri & Ors* [2020] 1 CLJ 747 ('*Chua Kian Voon*') at paragraph 14 and *SK Takaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia* [2009] 6 CLJ 705, at paragraph 5).
>
> [180] The above principle is in accord with the very language of Article 5(2) of the FC having regard to the words 'unless satisfied that the detention is lawful'. **The burden is constitutionally thrusted upon the detaining authority to establish to the Court's satisfaction that any given detention is lawful.** (emphasis added)

[89] In the context of legislation relating to detention, any period of time for detention must be construed strictly so as to not unfairly elongate the time spent in detention. The Federal Court in *Sugenthiran Paramasivam v. Deputy Minister of Home Affairs, Malaysia & Ors* [2024] 5 CLJ 549; [2024] 3 MLJ 342 explained that the time limits within legislation pertaining to detention must be construed in light of the fundamental right to personal liberty. Consequently, "excessive time" cannot be taken.

[90] In this light, it is clear that the 16 months of detention is excessive; indeed, there has been no evidence proffered that any attempt at making the necessary arrangements were done beyond statement of the respondents during the hearing of the appeal that the authorities were waiting until the applicant admitted falling under the jurisdiction of the Myanmar embassy. This is in spite of the aforementioned 'constitutionally thrust' burden upon the detaining authority (see *Zaidi Kanapiah* (above)).

[91] Bearing in mind that the applicant initially submitted a Bangladesh UNHCR card before obtaining the Malaysian UNHCR card, the position taken by the authorities that the applicant ought to admit to falling under the jurisdiction of the Myanmar embassy is strange to say the least. The Bangladesh UNHCR card indicates that the applicant is a refugee from another country who sought the protection of the UNHCR in Bangladesh. If there were attempts to check with the Bangladesh embassy on the applicant's status, we were not apprised of any.

[92] Having found that the reason for detaining the applicant was improper, we find that there is no basis for the applicant's continued detention. The unduly long detention of the applicant is wrongful and thus she ought to be released.

Issue 2: Whether There Was A Transgression Of Constitutionally Permissible Limits?

[93] We find further support for our decision in the Australian High Court[10] case of *NZYQ v. Minister For Immigration, Citizenship And Multicultural Affairs and Another* [2023] 415 ALR 254; [2023] 97 ALJR 1005; [2023] HCA 37

("*NZYQ*") which held that the absence of any real prospect of removing a non-citizen from Australia in the reasonably foreseeable future demonstrates that the detention cannot be said to be for the purpose of removal.

[94] *NZYQ* (above) is a case where the plaintiff was a Rohingya Muslim who could not be returned to Myanmar due to a well-founded fear of persecution with no relevant change in circumstances. The immigration authorities held him in continued detention after he was released on parole for the offence of committing a sexual offence against a child, as the authorities were of the view that he posed a danger to the community.

[95] The Australian High Court *NZYQ* (above) declared that the plaintiff's continuing detention was unlawful. The court stated in *NZYQ* (above):

> [46] Translated to the case at hand, *if the only purposes peculiarly capable of justifying executive detention of an alien are, as was said in Lim, removal from Australia or enabling an application for permission to remain in Australia to be made and considered, then the absence of any real prospect of achieving removal of the alien from Australia in the reasonably foreseeable future refutes the existence of the first of those purposes.* (emphasis added)

[96] In *NZYQ* (above) at para. 32, the court cited the following judgment of McHugh J in *Re Woolley; Ex parte Applicants M276/2003 (by their next friend GS)* [2004] 225 CLR 1; 210 ALR 369; 80 ALD 1; [2004] HCA 49 ("*Re Woolley*"):

> No doubt cases may also arise where *the connection between the alleged purpose of detention and the length of detention becomes so tenuous that it is not possible to find that the purpose of the detention is to enable visa applications to be processed pending the grant of a visa. If the law in question has such a tenuous connection, the proper inference will ordinarily be that its purpose is punitive. The fact that the law may also have a non-punitive purpose will not save it from invalidity.* (emphasis added)

[97] In *NZYQ* (above) at para. 50, the court cited the judgment of Gleeson CJ in *Re Woolley* (above) which explained further on whether detention laws are punitive in nature:

> If a non-citizen enters Australia without permission, then the power to exclude the non-citizen extends to a power to investigate and determine an application by the non-citizen for permission to remain, and *to hold the non-citizen in detention for the time necessary to follow the required procedures of decision-making. The non-citizen is not being detained as a form of punishment, but as an incident of the process of deciding whether to give the non-citizen permission to enter the Australian community.* Without such permission, the non-citizen has no legal right to enter the community, and a law providing for detention during the process of decision-making is not punitive in nature. (emphasis added)

[98] In *Re Woolley* (above), the court found that the detention of the minors in that case to be not unlawful. However, the principles enunciated in *Re Woolley* (above) are useful for our discussion. The court held the law stipulating detention in order for the carrying out of procedures to legalise the non-citizen's entry into Australia would not be considered punitive detention and thus would not be invalidated. If the length of detention of the non-citizen is too long, it becomes apparent that there is the lack of nexus between the detention and the purpose of detention to comply with procedural requirements. Thus, a long period of detention is more likely to lead to the inference that the detention is punitive and thus invalid.

[99] The Australian cases are of persuasive authority. They cannot be said to be in *pari materia* with the present case because apart from the difference in our statutory provisions, unlike Australia which grants visas for refugees to remain, Malaysia's approach to refugees is to resettle them in a third country. However, the principles in the cases of *NZYQ* (above) and *Re Woolley* (above) are consistent with the requirement of proportionality enshrined in art. 5(1) read with art. 8(1) of the Federal Constitution as stated in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780 ("*Alma Nudo*") by Richard Malanjum CJ.

[100] It is appropriate to consider the issue of proportionality in relation to the length of the applicant's detention and the purpose or measure for which such detention has been imposed. Under our Federal Constitution, the measure used must be proportionate to the objective as stated in *Alma Nudo* (above); put another way, the detention of the applicant must be proportionate to the objective of making the arrangements to remove them. In the present case, although no visa application is being processed, the authorities are holding the applicant pending making arrangements for her removal. However, the applicant has been held for nearly two years and this detention seems set to continue under the applicant's admission to the jurisdiction of the Myanmar embassy, as we have discussed above. What is essentially an indefinite detention, with no clear end in sight, cannot be said to be proportionate to the objective of making arrangements for removal (and that too has not been carried out expeditiously).

[101] It is also trite law that restrictions on fundamental rights must be construed narrowly (*Lee Kwan Woh v. PP* [2009] 5 CLJ 63; [2009] 5 MLJ 301, [13]); therefore, the period of detention "necessary for the purpose of making arrangements for his removal" must be construed narrowly and not as authorising extensive and excessive detention. In the present case, 16 months, with no end in sight, clearly transgresses upon this principle.

[102] We thus were of the view that this was a case where *habeas corpus* should be and was issued. We made further orders which we explain below.

Further Relief

[103] Following from the *habeas corpus* order, we ordered that the applicant should not be rearrested and detained immediately upon release on the grounds that she is to be deported, until a full consideration of the specific circumstances of her case is undertaken by the relevant authorities. We clarified this order to not exclude the applicant from being detained for an entirely different reason, such as if she commits a theft and that this order does not exclude her possible eventual deportation, provided it is lawful, once the respondents have considered her case in full. We also emphasised that this order is not to be equated with a right to remain in the country.

[104] We further ordered that the applicant should be placed in Yayasan Chow Kit or any equivalent shelter until full consideration of her case is complete. This is to avoid the applicant being left homeless and subject to the risk of being detained again.

[105] Finally, we ordered the authorities to produce the applicant in this court by 12pm the following day, *ie*, 10 April 2025 and invited a representative from UNHCR to attend. As it happened, Mr Devendiran Paramanantham, Head of the Legal Protection Unit in UNHCR Malaysia was present in court as an observer for this matter.

[106] We now give our reasons for making the above further orders.

The Courts Have Wide Powers To Craft Relief

[107] The courts are constitutionally and statutorily conferred wide discretion to grant remedies for infringements of constitutional rights. Paragraph 1 of the Schedule to s. 25 of the Courts of Judicature Act 1964 ("CJA") prescribes as follows:

> Powers to issue to any person or authority direction, orders or writs including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others **for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.** (emphasis added)

[108] The Malaysian courts, particularly in public law cases, have wide discretion to mould the relevant relief to meet the needs of justice in a particular case. As stated by Eusoffe Chin CJ in one of the two majority judgments in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147 ("*Ramachandran*"):

> It is clear that the High Courts and the Federal Court have adopted a liberal and progressive approach in *certiorari* proceedings, and I find that where the particular facts of the case warrant it the High Court should endeavour *to remedy an injustice when it is brought to its notice rather than deny relief to an aggrieved party on purely technical and narrow grounds. The High Court should mould the relief in accordance with the demands of justice.* (emphasis added)

[109] Edgar Joseph FCJ also for the majority in the same case of *Ramachandran* (above) stated:

> There are also India Supreme Court authorities which strongly support the proposition that the power of the courts there, in the field of Public Law remedies, is not limited, as in England, but much wider, so much so, that in certain circumstances, they have the power to review the decision of the authority on the merits and mould the relief according to the exigencies of the situation in order to satisfy the insistent demands for justice. (See for example, *State of Madhya Pradesh v. Bhailal Bhai* AIR 1964 SC 1006; *Dwarka Nath v. Income Tax Officer* AIR 1966 SC 81; *Behari Lal Baldeo Prasad v. Commissioner Jhansi Division* (1967) 63 ITR 555; *Hindustan Steel Ltd Rourkela v. Roy AK* AIR 1970 SC 1401 at p 1407; *Variety Emporium v. Mohd Ibrahim* AIR 1985 SC 207 at p 210.)
>
> *Having regard to the breadth of the provisions of para 1 of the Schedule to the Courts of Judicature Act 1964, it would be wrong to assume that the extent of the power of the courts in Malaysia in the field of Public Law remedies is limited in the same manner as that of the courts in the United Kingdom, where there are no such equivalent provisions …*
>
> *Needless to say, if, as appears to be the case, this wider power is enjoyed by our courts, the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors.* A flexible test whose content will be governed by all the circumstances of the particular case will have to be applied. (emphasis added)

[110] Therefore, we are satisfied that we had the necessary powers to make further orders as would suit the case. We now discuss the reasons for making the further orders which we did.

Our Further Order That The Applicant Cannot Be Rearrested Until Full Consideration Is Given The Specific Circumstances Of Her Case And Only If There Is A Real Prospect Of Removal In The Reasonably Foreseeable Future

[111] The Australian High Court in *NYZQ* (above) at paras. 71 & 72 helpfully explained the consequences of granting *habeas corpus* in a case such as the present one:

> [71] The consequence of ss. 189(1) and 196(1) of the Migration Act not validly applying to authorise the continuation of the plaintiff's detention at the end of the hearing on 8 November 2023 is that *the sole statutory basis relied on by the defendants for the continuation of his detention fell away and the plaintiff was entitled to his common law liberty.*
>
> [72] *Release from unlawful detention is not to be equated with a grant of a right to remain in Australia. Unless the plaintiff is granted such a right under the Migration Act, the plaintiff remains vulnerable to removal under s. 198. Issuing of a writ of habeas corpus would not prevent re-detention of the plaintiff under ss. 189(1) and 196(1) of the Migration Act in the future if, and when, a state of facts comes*

> *to exist giving rise to a real prospect of the plaintiff's removal from Australia becoming practicable in the reasonably foreseeable future. Nor would grant of that relief prevent detention of the plaintiff on some other applicable statutory basis,* such as under a law providing for preventive detention of a child sex offender who presents an unacceptable risk of reoffending if released from custody.
>
> (emphasis added)

[112] The detaining authority has the authority to detain the applicant under s. 34 when they conclude there is a real prospect of her removal becoming practicable. This does not translate to a continued detention for years.

[113] In our case however, there is additional difficulty as not only is the detention unlawful because of its disproportionate length, it is also unlawful due to the decision for removal being made with insufficient consideration of the relevant factors. Therefore, moulding the appropriate relief in our case requires also giving an order that the applicant cannot be rearrested or detained on the grounds she is to be deported until after undertaking a full consideration of the specific circumstances of her case, along with the consideration of the eminently relevant considerations as noted above.

[114] To be clear, this does not exclude her being detained for an entirely different reason, such as if she commits a theft. We cannot make an order that the applicant is entitled to remain at liberty even if she committed a crime as such an order would be at odds with the criminal justice system which mandates due punishment upon finding of guilt, *ie*, conviction for crime. Further, our order does not exclude her possible eventual detention, once the Director General considers her case in full.

[115] The reason why we were careful to make the boundaries of our further order clear is because we are not in any way pre-empting or usurping the power of the Director General to consider the applicant's case and to decide to make the order for removal. In this appeal, we are not looking at the merits of the applicant's case to remain in Malaysia. The question before us is whether her detention was unlawful such as to warrant the grant of a writ of *habeas corpus*, which we answered in the affirmative.

[116] The fact that the Director General did not properly exercise his discretion to make the order for removal does not mean that the court ought to substitute the decision of the Director General with one of its own. *Craig* (*supra*) at section 21-002 pp. 642-643 states:

> It is important at the outset to be clear about the limits of judicial intervention over discretion: *it is not for the courts to substitute their choice as to how the discretion ought to have been exercised for that of the administrative authority. They should not intervene, reassess the matter afresh and decide* .... Our basic conceptions of political theory and the allocation of governmental functions are against this approach. Decisions as to political and social choice are made by the legislature, or by a person assigned the task by the legislature ... To sanction general judicial intervention simply because

> the court would prefer a different choice to that of the administrator runs counter to this fundamental assumption and would entail a re-allocation of power from the legislature and bureaucracy to the courts. *The courts accept that it is not their task to substitute judgment ... While all accept that it is not for the courts to substitute judgment, it is also recognized that there should be some control over the rationality of the decisions made by the administration. ...*
>
> (emphasis added)

[117] The interplay between the doctrine of separation of powers and the role of the judiciary as a check and balance on executive power is important to understand. In this case, Parliament has legislated that the Director General has the discretion to make orders for removal and as stated in the foregoing paragraph, the judiciary has the function to exercise oversight over the exercise of such discretion to ensure that it was properly exercised. We thus ordered that if the applicant is to be deported, the discretion must be exercised in accordance with the principles we have set out in our grounds. The personal liberty of the person is sacrosanct such that the authorities ought not decide mechanically without considering all relevant circumstances of the applicant's unique case.

Our Further Orders That The Applicant Be Placed With A Shelter Upon Her Release And That She Be Brought To Court With A UNHCR Representative In Attendance

[118] Mr Devendiran Paramanantham, Head of the Legal Protection Unit in UNHCR Malaysia was present in court on the hearing date as an observer for this matter and attended court the following day on our invitation. UNHCR Malaysia also procured an interpreter to translate the second day's court proceedings before us for the benefit of the applicant.

[119] On 9 April 2025, we inquired as to the ability of UNHCR Malaysia to provide care for the applicant and the steps that would be taken in order to that end as we were particularly concerned that our order would not result in the applicant being left to fend for herself on the streets. In response, Mr Devendiran undertook to make arrangements for the applicant's care post-release from detention. He informed us that UNHCR Malaysia would seek support for her within the community as she has family members in Malaysia and that the exact place to lodge her would depend on an available and suitable location.

[120] The next day, Mr Devendiran attended court with a UNHCR card for the applicant and explained that the following steps that would be taken would be determined after they conduct a thorough interview with the applicant, seeing as due to her detention, they had yet to conduct a proper assessment to ascertain her circumstances. We were satisfied that UNHCR would ensure the applicant's safe care but we also instructed the applicant's lawyer, Mr Nik Nasrun Nazmi Nik Mohamad to also oversee the process.

[121] We also commend the Tanah Merah Immigration Detention Depot for giving effect to our order to produce the applicant in court before us the following day. The commandant of the depot himself brought the applicant to court. It was with the co-operation of all parties that we could ensure that the applicant could be properly released from detention as per our order.

Conclusion

[122] For the reasons above, we granted an order that a writ of *habeas corpus* is to issue and made further orders which were in our view necessary to secure the applicant's safety.

Endnotes:

1. The Federal Court case of *Nivesh Nair Mohan v. Dato' Abdul Razak Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* (Case No: 05(HC)-7-01-2020(W)) decided on 25 April 2022 stated in the court's broad grounds:

   > [1] We adopt and uphold the minority judgments of this court in *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579 and *Zaidi bin Kanapiah v. ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759 as well as the most recent decision of this court in *Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors* [2022] 1 LNS 583.

   Therefore, the minority decision in *Zaidi Kanapiah* (above) is now good law.
2. https://www.oxfordleamersdictionaries.com/definition/english/liable
3. Hearing a magistrates' court appeal under s. 13 of the Motor Garage By-laws.
4. Open access on JSTOR, https://www.istor.org/stable/ii.16275978.13
5. https://www.unhcr.org/mv registration#:~:text=Text%20and%20media%201.neither%20is%20it%20a%20passport.
6. https://www.unhcr.org/registration-guidance/chapter5/documentation/#:~:text=17,authorities%2C%20whether%20formally%20or%20informally.
7. See for example, the study by Mohd Zefri AA, Nukman A, Nambiar P, "Validity of the Third Molar Age Estimation from Different Dental Age Estimation Surveys for Malays and Chinese in Malaysia – A Pilot Study", Annals of Dentistry University of Malaya (ADUM), Vol. 21 (1), 2017 (33-40) https://adum.um.edu.my/index.php/adum/article/view/10803. This study found that there is no single valid dental development survey to determine age with certainty, although this statement was made in relation to their study subjects who were Malays and Chinese. See also Kurniawan A et al "The Applicable Dental Age Estimation Methods for Children and Adolescents in Indonesia", Int J Dent. 2022 Feb 15; 2022: 6761476. https://pmc.ncbi.nlm.nih.gov/

articles/PMC8863470/#:~:text=Determining%20the%20chronological%20age%2C%20especially.the%20 chronological%20age%20%5B22%5D. which states that there are many methods to use to estimate age but the accuracy and results depend on the most appropriate method in the circumstances of each case and condition.

8. See the statement by the British Dental Association (BDA) dated 18 October 2021 titled "Child asylum seekers: dental age check plan dropped, but key questions remain" at https://www.bda.org/media-centre/child-asylum-seekers-dental-age-check-plan-dropped-but-key-questions-remain/
9. https://dentistrv.co.uk/2024/01/16/dental-x-ravs-mav-now-be-used-to-determine-age-of-asvlum-seekers/
10. The highest court in Australia.